UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CHERI ANN HUTSON,

Plaintiff,

v. Case No. 2:15-cv-02411-STA-cgc

FEDERAL EXPRESS CORPORATION,

Defendant.

RESPONSE IN OPPOSITION TO DEFENDANT'S FIFTH MOTION IN LIMINE

Plaintiff files this Response in Opposition to Defendant's Fifth Motion in Limine to Exclude Evidence of Defendant's Failure to Hire Women in Management in GOC. Defendant claims that this evidence should be excluded because "pattern and practice" evidence is not relevant or admissible in a single plaintiff intentional discrimination case. In opposition, Plaintiff would state as follows:

BACKGROUND

Ms. Hutson's instance of gender discrimination and the anecdotal evidence of Ms. Free's and Ms. Doyle's circumstances are not isolated instances. Indeed, Defendant's GOC Memphis has a long history of exclusivity. Since 1986, there have only been 3 female Senior Managers in GOC: Cheri Hutson (5/1/1998 to 1/15/2001), Bobbi Wells (5/1/1998 to 7/15/2010) and Ronda Doyle (1/1/2007 to 2/28/2013). (SOF 168). Since January 1, 2000, sixteen (16) women have applied for GOC Manager positions in Memphis. Only one female (Debi Minnick) has been hired. (SOF 169).

Mr. Tronsor became the Managing Director in GOC in October 2006. Since becoming the MD, one female was hired as a senior manager, Ronda Doyle. Since 2007, sixteen (16) women have applied for GOC Manager positions in Memphis. Only one female (Debi Minnick) has been hired.

- For the February 2007 GOC Senior Manager position four men (Mike Sienkiewicz, Jay Rider, Robert Brown, and Terry Conner) and one woman (Cheri Hutson) applied for the position. Mike Sienkiewicz was selected for the position.

- For the GOC Manager position posted on October 10, 2010, twenty men (Joey Ray, Greg Hassler, Jerome Sularin, Michael Brigance, Hector Razo, James Frank, Mike Epps, Roy Isakson, Steve Freeman, Daryl Camp, William LaVeck, Zachary Klinck, Scott Willard, Ray Jansco, Rickey Hobson, Brian Plowman, Jonah Odum, Edward Jones, Douglas Comb and Larry Ashkcnaz) and two women (Christi Free and Barbara Callian) applied for the position. No one was hired.

- For the GOC Manager position posted in December 2010, nine men (Chris Simons, Rickey Hobson, Johnny Fayne, Steven Pendleton, WilliamLaVeck, Daryl Camp, Ray Jansco, Derek Wickens and Mike Epps) and one woman (Barbara Callian) applied for the position. Chris Simons was selected for the position.

- For the February 2, 2011 GOC Manager position, thirteen men (Clay Ford, Mike Meadors, Jason Eckard, Shane Floyd, Rudy Cruz, Ernest Papa, Adrian Leaks, Steve Pendleton, Donnie Hopkins, Ian McCollom, Doug Combs, Mike Brigance and Larry Ashkenaz) and four women (Christi Free, Lucy Crays, Angie Pate and Lil Burroughs) applied for the position. No one was hired.

- For the August 26, 2011 GOC Manager position, eight men (Rudy Cruz, Doug Combs, John Robertson, Jason Eckard, Shane Floyd, Norman Banister, Zack Klinck and Ernest Papa) and two women (Lucy Crays and Crystal Butcher) applied for the position. Shane Floyd was selected for the position.

- For the March 8, 2013 GOC Manager position, ten men (Larry Ashkenaz, Doug Combs, Rudy Cruz, Joe Cannon, Jim Whitehead, Mike Epps, Joey Ray, Scott Whitney, Harry Bahm and Michael Wilson) and five women (Renee Mackey, Barbara Callian, Christi Free, Amy Lindsey and Sherrie Hayslett) applied for the position. Rudy Cruz was selected for the position.

- For the July 5, 2013 GOC Manager position, four men (Joe Cannon, Joey Ray, Mike Epps and Demetrius Holt) and four women (Christi Free, Barbara Callihan, Debi Minnick and Sherrie Hayslett) applied for the position. Debi Minnick was selected for the position.

- For the July 2013 GOC Senior Manager position five men (Larry Mason, David Kirby, Gerald Riggins, Bubba Allen, Jay Rider and Bobby Dunavant) and one woman (Cheri Hutson) applied for the position. Bobby Dunavant was selected for the position.

- For the March 14, 2014 GOC Manager position, 21 men (David Kirby, Harry Bahm, Jim Whitehead, Greg Sullivan, Joe Cannon, William LaVeck, Steve Gulstrom, Brian Maynes, Robert Clay, Larry Mason, Zachary Kinck, Joey Rya, Mike Epps, David Berwick, Ernest Papa, David Leigh, Christopher Page, Demetrius Holt, Scott Whitney, Ben Thompson and James Taylor) and two women (Christi Free and Ina Wiehl) applied for the position. No one was interviewed or hired due to the Indianapolis closure and consolidation.

- For the September 9, 2014 GOC Manager position, seventeen men (Larry Mason, Joey Ray, Steve Gulstrom, Joe Cannon, David Leigh, Jim Whitehead, Douglas Combs, Andrew Bailey, Demetrius Holt, Randy Jones, David Cheesman, Kevin McCormick, William LaVeck, Ernest Papa, Zachary Klinck, David Berwick and Benjamin Thompson) and two women (Kellie Roberts and Cheryl Burroughs) applied for the position. Steve Gulstrom and Joe Cannon were hired for the position.

- For the March 6, 2015 GOC Manager position, eleven men (Demetrius Holt, Kurt Hylander, Jim Whitehead, James Sneed, Clay Ford, Bill LaVeck, David Kirby, Ernest Papa, Drew Bailey, David Berwick and Jason Price) applied for the position. James Sneed was hired for the position but did not pass his dispatcher's license course. As a result, he was returned to his former position, and Kurt Hylander was hired.

- For the November 13, 2015 GOC Manager position, ten men (Andrew Bailey, Slade Shelton, Jim Whitehead, J. Scarborough, David Kirby, Joseph Dandan, Richard Kelsey, Jason Price, Scott Harrison and Ernest Papa) and one woman (Kellie Roberts) applied for the position. Slade Shelton and Andrew Bailey were selected for the position.

The current management of GOC department is comprised of 21 men (Downie Talbot, Orlando Marner, Thomas Adcock, John Bubba Allen, David Bradford, Paul Tronsor, Stephen Gulstrom, Gregory Halliday, Bobby Dunavant, Kurt Hylander, David Lusk, Gerald Riggins, Michael McAfee, Donald Rider, Michael Sienkiewicz, Michael Cannon, Rudy Cruz, David Bledsoe, Christopher Simons, Andrew Bailey, and James Shelton) and 1 woman (Debi Minnick).

ARGUMENT

Defendant contends that this evidence of a "history and pattern" should not be admissible at trial because it is not relevant to Plaintiff's individual claim, because its unfairly prejudicial, and because it is improper opinion testimony. Defendant, however, fails to grasp that this is clear circumstantial evidence of Defendant's and specifically, Paul Tronsor's discriminatory intent.

The FedEx Affirmative Action Policy directs how a management employee is to use the Management Affirmative Action Program (MGRAAP). (Tronsor, Dep Exhibit 3 – FILED UNDER SEAL). "Manager will use the MGRAAP screen before recruiting to determine Affirmative Action hiring needs." (Id. at AA 16). Further, managers will use the screen before each planning meeting, such as budget, manpower, MBO, etc. and before their own Performance Review to ensure their knowledge of current Affirmative Action goals. Senior managers and above "will review the MGRAAP SCREEN for a summary of their own Total Organization to ensure that their managers are meeting Affirmative Action goals." (Id. at AA 16)

Specifically, Plaintiff believes that the managers in GOC are required to frequently access the MGRAAP screen to determine the utilization of minorities and females in that job. These screening summaries were seen by Mr. Tronsor, in all instances where he was the hiring manager and in instances when his subordinates were hiring managers. These screening reports in most, if not all hiring decisions since Tronsor became MD, indicated an underutilization of females management of GOC. For example, the screening report for the senior manager position in question in this case shows 0% women as senior managers of GOC with 20% availability of females and 5.5% women as managers in GOC with 25.5% availability of females. (Tronsor, Dep Exhibit 2). When the availability of females/minorities exceeds the number that is actually in the specific job group, under-utilization occurs. This under-utilization prompts the designation

"ACT" on the screen report which is an abbreviation for ACTION. The Act prompt lets the hiring managers know if he is under-utilized in a specific job group, "therefore letting him know that he needs to take action in his future recruitment efforts to correct this underutilization." (Tronsor, Dep Exhibit 3, AA 16)

Ronda Doyle will testify that she discussed the underutilization of women with Mr. Tronsor on many occasions. Despite this knowledge and these tools, GOC management under Mr. Tronsor consistently chose males for management positions in GOC. Mr. Tronsor's record and his failure to promote women to management are evidence of intentional gender discrimination.

Using such evidence has been permitted in individual disparate treatment cases dating back to the earliest significant cases of discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973). Further, the Sixth Circuit Court of Appeals has also permitted individual plaintiffs to use such evidence. Barnes v. Diversitech General, Inc., 896 F.2d 1457, 1469 (1990) (individual cases consolidated for purposes of appeal). By demonstrating the existence of a discriminatory pattern or practice, a plaintiff may establish a presumption that he or she has been discriminated against. Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 875 (1984). A discriminatory pattern is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue. Diaz v. American Telephone & Telegraph, 752 F.2d 1356, 1363 (9th Cir. 1985).

Accordingly, the miniscule number of females in management positions, Mr. Tronsor's knowledge of this issue, FedEx's policies designed to rectify these issues, Mr. Tronsor's status as the hiring manager for GOC management during the relevant time period, and the perpetuation of underutilization of women in the department create within Defendant's GOC is circumstantial evidence that Mr. Tronsor intended to discriminate against Ms. Hutson as in every occasion he had to address the issue of underutilization, he purposefully and intentionally chose not to.

CONCLUSION

For the foregoing reasons, the Court should deny Defendant's fifth motion in limine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served via the Court's ECF system on Mr. Joseph B. Reafsnyder, attorney for Defendant, Federal Express Corporation, 3620 Hacks Cross Road, Memphis, TN 38125, on January 30, 2017.

/s/Donald A. Donati